SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

BRIEF OF RESPONDENT OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

ROBERT T. FOX,
CARL B. STONER,
THOMAS D. CALDWELL,
MAURICE YOFFEE,
Counsel for Respondent.

INDEX.

Subject Index.

Index of Cases.

STATUTES.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 426

MILK CONTROL BOARD OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

vs.

EISENBERG FARM PRODUCTS, A PENNSYLVANIA CORPORATION.

BRIEF OF RESPONDENT OPPOSING THE GRANTING OF A WRIT OF CERTIORARI.

I.

Opinions Below.

The opinion of the Supreme Court of Pennsylvania is reported in 200 Atlantic Reporter 854, and also appears in the record of the present proceedings (R. 32). This opinion, entered June 30, 1938, affirms the decree entered by the Chancellor of the Court of Common Pleas of Dauphin County; the opinions of the latter court are unreported at present; they appear in the record of the present proceedings (R. 15, 26).

II.

Question Presented.

Can the Milk Control Commission of the Commonwealth of Pennsylvania, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce?

III.

ARGUMENT.

We present our argument opposing the granting of a writ of certiorari under six points with a discussion under each point.

1.

The Milk Control Commission of the Commonwealth of Pennsylvania cannot, under the guise of stabilizing the milk industry of this commonwealth, directly burden or regulate milk shipped in interstate commerce.

The Milk Control Act shows a comprehensive scheme to regulate the buying and selling of milk. Such purchases can be made only by those who hold licenses from the commonwealth, file bonds and keep certain records. The milk can only be purchased subject to the minimum price established by the Milk Control Commission. That is, under the asserted authority, the Milk Control Commission may fix and determine the price to be paid for milk which is bought, shipped and sold in interstate commerce.

Applying the facts to the statute, it would appear that the statute denies the privilege of engaging in interstate commerce except to dealers licensed by the Commonwealth of Pennsylvania and provides a system which enables the Milk Control Commission to fix the profit which may be made in dealing with the subject of interstate commerce.

It is our contention that even if the regulations are not directed solely against interstate commerce but if the regulations have that effect, they must be declared invalid regardless of the proportion which such commerce bears to the total commerce of the State. If the respondent in the instant case is required to pay the price fixed by the Commission and also to post a bond and pay license fees, the cost of the milk would be increased by the costs of the premium on the bond, plus the license fee, plus the increase in the price ordered by the Commission and the net result would be equivalent to an imposition of a tax on milk destined to another State.

2.

The Farmers Grain Company cases, DiSanto v. Pennsylvania and related cases, control the instant case.

The highest court of the Commonwealth of Pennsylvania ruled that the instant case was controlled by the case of *DiSanto* v. *Pennsylvania,* 273 U. S. 34 (1926). In addition to this authority, we urge upon this Honorable Court that the instant case is likewise controlled by the *Farmers Grain Company* cases, referred to hereafter.

The law as stated in the *DiSanto* case is a consistent statement of the law of the United States Supreme Court. We respectfully submit that if this Honorable Court would have decided the *DiSanto* case otherwise it would have had to reverse all its previous rulings with respect to the authority of a State to pass legislation which directly interferes with or burdens interstate commerce.

Mr. Justice Butler, in writing the opinion in the *DiSanto* case followed the *Farmers Grain Company* cases. Mr. Justice Brandeis filed a dissenting opinion wherein it was stated that the facts in the *DiSanto* case were unlike the facts considered in the *Farmers Grain Company* cases in that the statute in the *DiSanto* case did not affect the price of articles

moving in interstate commerce and that licensing and supervision of dealers in steamship tickets was in essence an inspection law. In other words, Mr. Justice Brandeis *distinguished* the facts in the *DiSanto* case from the facts in the *Farmers Grain Company* cases and did not intimate that the law in the *Farmers Grain Company* cases was not still the law.

We likewise urge upon this Honorable Court that the statute in the instant case could not be interpreted as an inspection law in view of the separate and distinct inspection laws passed by the Commonwealth of Pennsylvania and referred to hereafter in our brief.

In *Shafer* v. *Farmers Grain Company,* 268 U. S. 189 (1924), the North Dakota Statute provided, among other things, that every buyer operating a public grain elevator must obtain a yearly license, the fee for which was to be adjusted to the capacity of the elevator, and required those operators who do not pay cash in advance to file with the supervisor a sufficient bond to secure payment for all wheat bought on credit and to keep records of all purchases.

The statute also required the State supervisor to investigate and supervise the marketing of grain for the purpose of preventing various things which were deemed unjust and fraudulent and authorized him to make rules and regulations to carry out the provisions of the act.

This Honorable Court, at page 201, held:

> "We think it plain that, in subjecting the buying for interstate shipment to the conditions and measure of control just shown, the Act directly interferes with and burdens interstate commerce, and is an attempt by the State to prescribe rules under which an important part of such commerce shall be conducted. *This no state can do consistently with the commerce clause.*" (Emphasis ours.)

The regulation sought to be imposed in the instant case is very similar to the regulation sought to be imposed in *Lemke* v. *Farmers Grain Company*, 258 U. S. 50 (1921). In that case the Act provided that purchases of grain could be made only by those who held licenses from the State, pay State charges for the same, and act under a system of grading, etc., defined in the Act, and that grain could only be purchased subject to the power of the inspector to determine the margin of profit which the buyer should realize upon his purchase.

There, after outlining the control to be exercised under the State Act, this Honorable Court held:

> "That is, the state officer may fix and determine the price to be paid for grain which is bought, shipped, and sold in interstate commerce. That this is a regulation of interstate commerce, is obvious from its mere statement."

In *Baldwin* v. *Seelig*, 294 U. S. 511 (1935), the Statute in New York attempted to regulate the price of milk to be paid in Vermont for shipment into New York. Without questioning the fact that the transaction was one in interstate commerce, the late Mr. Justice Cardozo in delivering the opinion of this Court, said:

> "Such a power, if exerted, will set a barrier to traffic between one state and another as effective as if custom duties, equal to the price differential, had been laid upon the thing transported * * *. '*It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business.*'
>
> "Milk may be excluded if necessary safeguards have been omitted; but commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another, in the faith that augmentation of prices will lift up the level

> of economic welfare, and that this will stimulate the observance of sanitary requirements in the preparation of the product. * * * Whatever relation there may be between earnings and sanitation is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between states. Cf. Asbell *v.* Kansas, 209 U. S. 251 at 256; Railroad Company *v.* Husen, 95 U. S. 465 at 472." (Emphasis ours.)

In *Motor Transit Company* v. *Railroad Commission of California*, 15 Federal Supplement 630 (1936), a State statute required each agent of a motor stage company selling tickets over highways of the State to procure a license and to get a five thousand dollar bond conditioned on the faithful performance of the contract of transportation. The transportation company operated across the state line and was engaged in interstate commerce.

This Honorable Court, in declaring the Act unconstitutional, held:

> "In our opinion the act, admittedly very indefinite in its terms, in effect offends against the commerce clause of the Constitution and that its enforcement is practically impossible, and any attempt to enforce it against complainants would act to their irreparable injury. * * * The decision of the Supreme Court in DiSanto *v.* Commonwealth of Pa., 273 U. S. 34; 47 S. Ct. 267; 71 L. Ed. 524, is decisive upon that question."

In the case of *Highland Farms Dairy, Inc.*, v. *Agnew*, 300 U. S. 608 (1936), a creamery company in Washington, D. C., purchased milk from farmers in Virginia and Maryland. It sold its entire output of bottled milk to a retail store in Virginia. A Virginia statute set up certain regulations pertaining to the milk industry. The Milk Commission of Virginia realized that the creamery company of Washing-

ton, D. C., was not subject to the provisions of the statute in that its sales and purchases in Virginia were transactions in interstate commerce. It was held that the statute establishing a price minimum would apply only to the milk sold in Virginia by a retailer within the established market area.

We respectfully submit that the cases cited *supra* control the instant case.

3.

Munn v. Illinois, and the decisions of this Court based thereon, do not control the instant case.

We have carefully examined the opinions in *Munn* v. *Illinois* and the subsequent cases based thereon, and cannot agree that this line of cases controls the present situation. We will take up the cases relied on by the petitioner and point out to this Honorable Court their distinction from the instant case.

In *Munn* v. *Illinois,* 94 U. S. 113 (1876), the question was whether, as respects an elevator devoted to storing grain for hire, the State could regulate the storage charge, where part of the grain reached the elevator, or was destined to leave it, through the channels of interstate commerce.

This Honorable Court held such a regulation admissible because of the public character of the elevator and because no restriction on *buying* or shipping was involved.

In *Cargill Company* v. *Minnesota,* 180 U. S. 452 (1900), the court had before it a State statute, much of which had been pronounced unconstitutional by the State court.

In sustaining the provision which remained, this Honorable Court held, page 470:

> "The statute puts no obstacle in the way of the *purchase* by the defendant company of grain in the state, or the shipment out of the state of such grain as is purchased."

In *Merchants Exchange* v. *Missouri*, 248 U. S. 365 (1918), the statute involved required that public weighers, appointed for the purpose, should do the weighing and issue weight certificates at elevators used for storing or transferring grain for hire, and prohibited any other person from issuing said certificates at an elevator where a public weigher was stationed. Objection was made to the prohibition on the ground that, as applied to the grain received from or shipped to points without the State, it burdened interstate commerce.

Of course the objection was overruled, the statute being an admissible regulation of the business of conducting an elevator for hire like the statute considered in *Munn* v. *Illinois*.

In *Budd* v. *New York*, 143 U. S. 517 (1891), this Honorable Court considered a statute fixing the maximum charge for elevating, receiving, weighing and discharging grain at elevators and warehouses almost exactly as in *Munn* v. *Illinois*. *The statute had no relation whatever to the purchase or sale of grain.*

In *Brass* v. *North Dakota*, 153 U. S. 391 (1893), the statute under consideration regulated grain warehouses and the weighing and handling of grain, requiring public warehousemen to give bond to the State, fixing rates of storage and requiring warehousemen to carry insurance. *Here, too, there was no restriction or regulation on buying or selling and the effect on interstate commerce was only incidental and remote.*

In *Townsend* v. *Yeomans*, 301 U. S. 441 (1936), this Honorable Court was considering the Act of the Legislature of Georgia prescribing the maximum charges which could be made by warehousemen for the handling of tobacco. Under the method of handling tobacco in Georgia the tobacco is brought to the warehouse by the seller and there sold to buyers who immediately ship the tobacco to other

States. Payment for the tobacco is made to the warehouseman who deducts his charges and remits the balance to the sellers.

The Act had no relation whatever to the buying and selling of tobacco and was *distinguished* by this Honorable Court from the *Farmers Grain Company* cases by showing that the "Georgia Act lays no constraint upon purchases in interstate commerce, does not attempt to fix the prices or conditions of purchases, or the profit of the purchasers. It simply seeks to protect the tobacco growers from unreasonable charges of the warehousemen for their services to the growers in handling and selling the tobacco for their account."

In *Hartford Accident and Indemnity Company* v. *People of Illinois, ex Rel. McLaughlin,* 298 U. S. 155 (1936), the character of the products lost their interstate identity when they came to rest in the State of Illinois with the express purpose of being sold in the State of Illinois. The requirement of a bond did not burden interstate commerce because the business of the defendant was of a *local* nature and the regulations set up by the State were proper.

We call this Honorable Court's attention to the *Shafer* v. *Farmers Grain Company* case, cited *supra,* wherein, at page 201, the cases that we have referred to above, and relied on by the petitioner, have been distinguished from the *Shafer* case, and we respectfully submit that the instant case is distinguishable from the said cases in the same manner.

To summarize briefly the distinction between the line of cases relied upon by the petitioner and the cases relied upon by the respondent, we quote from the opinion of the learned Chancellor below (R. 29):

> "The distinction between Munn *v.* Illinois, Townsend *v.* Yeomans, and the other cases relied upon by the plaintiff, on the one hand, and the Farmers Grain Com-

> pany Cases and the present case, on the other, lies in the fact that in the former the regulation was confined to warehouses, elevators, or other agencies through which interstate commerce might flow, but whose activities were entirely intrastate. In the latter cases the statutes sought to regulate the act of purchasing articles which were to be shipped in interstate commerce, and to prohibit such purchases unless made upon terms prescribed by the statute and by administrative agencies. It is not the milk receiving plant operated by the defendant that the plaintiff seeks to regulate, but the business conducted by the defendant of buying and shipping milk."

The learned Chancellor then expressed the difference in the effect upon interstate commerce of various regulatory statutes in the following manner (R. 30):

> "There is a vast difference in the effect upon interstate commerce of a statute regulating a warehouseman or grain elevator through whose hands interstate commerce passes, and a statute regulating and controlling the purchase of a commodity and the transportation thereof in interstate commerce. Townsend *v.* Yeomans does not overrule, directly or indirectly, the Farmers Grain Company Cases, but is distinguished from those cases in exactly the same manner as is Munn *v.* Illinois."

4.

The desirability of a statute is not the test in determining its enforcibility if the effect burdens interstate commerce.

However desirable it may be for the Pennsylvania Milk Commission to stabilize the dairy industry, and however necessary it may be for it to regulate the transactions of the respondent and other buyers of milk similarly engaged, to effect this purpose, we contend that the effect of the present statute would be to regulate and to place a burden upon interstate commerce.

The petitioner contends that we should assume the existence of evils justifying the people of the Commonwealth of Pennsylvania in adopting the statute. We respectfully submit that the answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with the Commonwealth of Pennsylvania, but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interest of the people of all the States that are affected.

It is further alleged by the petitioner that the legislation before this Honorable Court is in the interest of the milk producers and essential to protect them from fraud and to secure payment to them of fair prices for the milk actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce, if legislation of that character is needed. These supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which greatly encroach upon the field of interstate commerce placed by the Constitution under Federal control.

The right to buy milk for shipment and to ship it, in interstate commerce, is not a privilege derived from State laws and which the State may fetter with conditions, but is a fundamental right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution.

We respectfully submit that in subjecting the buying for interstate shipment to the conditions and measures of control just shown, the statute directly interferes with and burdens interstate commerce, and is an attempt by the Commonwealth of Pennsylvania to prescribe rules under which an important part of such commerce shall be conducted. We respectfully submit that no State can do this consistently with the Commerce Clause.

The petitioner further contends that if the farmers are underpaid they will be tempted to save the expense of sanitary precautions. There is neither evidence nor presumption that such a situation will result. But, apart from such defects of proof, the evils springing from uncared for cattle must be remedied by measure of repression more direct and certain than the creation of prices. In addition thereto, our milk inspection laws remedy any potential unsanitary conditions.

For the information of this Honorable Court, we respectfully submit that there have been innumerable acts passed covering the period from 1853 to 1935 prohibiting the sale of impure and unwholesome milk and prescribing a host of regulations to insure such supply. These regulations or inspections are separate and distinct from the Milk Act of 1937. This latter Act deals exclusively with the fixing of maximum and minimum prices of milk, whereas the former Acts dealt exclusively with regulations insuring pure and wholesome milk.

It is therefore obvious that the Milk Act of 1937 under consideration cannot be interpreted to be an inspection law. A reference to the Digest of the Pennsylvania Statutes (31 Purdons Statutes, 521-660g) discloses that at present there are many laws in force intended to accomplish the same end and providing severe penalties which apply directly to the evils described in the Preamble of the Milk Control Law.

5.

Does the right of a State, under the exercise of its police power, rise above the prerogative of the Federal Government to control interstate commerce or, at least, exist until the Federal Government exercises some control over the subject matter?

It was contended by the State in the *Farmers Grain Company* cases, as it is contended here, that the regulations could

stand upon the principle which permits the State to make local laws under its police power in the interest and welfare of its people, which are valid although affecting interstate commerce, and may stand, at least until Congress takes possession of the field under its superior authority to regulate commerce among the States.

It was held that this principle has no application where the State passes beyond the exercise of its legitimate authority and undertakes to regulate interstate commerce by imposing burdens upon it. A State statute which, by its necessary operation, directly interferes with or burdens such commerce is a prohibited regulation regardless of the purpose for which it was enacted.

The Pennsylvania Legislature in adopting the Milk Control Law of 1937 recognized this principle. Section 1202 of the Milk Act provided that no provision of the law shall apply, or be considered to apply to foreign or interstate commerce, except insofar as the same may be effective in accordance with the Constitution of the United States and the Laws of Congress enacted pursuant thereto.

The case of *Townsend* v. *Yeomans, supra,* is strongly relied upon by the petitioner as authority for the proposition that where a matter admits of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. This, however, does not permit a State to regulate or place a burden upon interstate commerce and this Honorable Court clearly indicated that the State statute there under consideration did not impose such a burden.

This Honorable Court held, at page 455:

> "• • • we find no ground for concluding that the state requirements lay any actual burden upon interstate or foreign commerce. The Georgia Act does not attempt to fix the prices at the auction sales or to regulate the activities of the purchasers. The fixing of rea-

sonable maximum charges for the services of the warehousemen in aid of the tobacco growers does not militate against any interest of those who buy. They pay the bid price, as accepted, and the warehousemen pays the seller, deducting from the purchase price the warehouse charges."

We call this Honorable Court's attention to the *Minneapolis Rate Cases*, 230 U. S. 352 (1913), wherein this principle and its limitations are discussed.

We quote from page 400:

"The principle, which determines this classification (between federal and state power), underlies the doctrine that the States cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the States are not permitted directly to regulate or restrain that which from its nature should be under the control of the one authority and be free from restriction save as it is governed in the manner that the national legislature constitutionally ordains."

6.

A reversal of the opinion of the court below would nullify the Commerce Clause of the United States Constitution and would unstabilize the milk industry of the United States.

The petitioner submits to this Honorable Court that unless it be given the right to control interstate commerce the milk industry of the United States will be unstabilized and will result in a detriment to the dairy farmers and the consuming public.

We respectfully submit that if the Commonwealth of Pennsylvania were to be sustained in this position the Commerce Clause of the United States Constitution would be nullified and of no legal significance. It would be useless to advance to this Honorable Court any argument touching on interstate commerce. The Commonwealth of Pennsylvania

would have its own regulations concerning interstate commerce and the forty-seven other States would have their own regulations on interstate commerce. We would then find ourselves back to the time of the Constitutional Convention when each State wanted to be free and independent and not subject to a national body which would have exclusive jurisdiction over matters of national importance. Chaos and extensive trade barriers will result if the position of the petitioner, as stated in the fourth reason for granting the petition for certiorari is recognized. It is a matter of common knowledge that trade barriers are rapidly being erected by a number of States.

In conclusion, we wish to say that the development of this country has been built on several forces. One of them has been its vast free market. If we were now to turn back the clock one hundred and fifty years and were to break the country into forty-eight small markets, and even hundreds of smaller markets, the end of our progress is in sight.

Conclusion.

For the reasons urged above, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

ROBERT T. FOX,
CARL B. STONER,
By THOMAS D. CALDWELL,
MAURICE YOFFEE,
Counsel for Respondent.